U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NO. 99-090
ALJ CASE NOS. 96-ERA-43
98-ERA-24
DATE: May 23, 2000

IN THE MATTER OF

MAGED F. GABALLA,
COMPLAINANT,

v.

CAROLINA POWER AND LIGHT COMPANY,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Petitioner:
David K. Colapinto, Esq.,
Kohn, Kohn & Colapinto, P.C., Washington, D.C.

For the Complainant:
M. Travis Payne, Esq.,
Edelstein and Payne, *Raleigh, North Carolina*

For the Respondent:
Rosemary G. Kenyon, Esq.,
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L. L. P., Raleigh, North Carolina

FINAL ORDER GRANTING MOTION TO STRIKE THE PETITION FOR REVIEW AND DISMISSING THE COMPLAINT

Complainant's former counsel, David Colapinto, requests this Board to review a settlement agreement submitted by the parties and approved by the Administrative Law Judge ("ALJ"). Colapinto argues that the settlement agreement is invalid because it fails to

address his claim for attorney's fees. Complainant moved to strike the petition for review. We grant Complainant's motion to strike and close the case.

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BACKGROUND

In 1996 and again in 1997, Maged Gaballa filed with the U. S. Department of Labor whistleblower complaints against his employer, Carolina Power & Light Company ("CP&L"). Gaballa alleged that CP&L violated the employee protection provisions of the Energy Reorgani-zation Act of 1974 ("ERA") by harassing and retaliating against him because he engaged in pro-tected activity. 42 U.S.C.A. §5851 (1995); 29 C.F.R. Part 24 (1999). After investigating the complaints, the Department of Labor determined that CP&L had not violated the ERA. Gaballa requested a hearing, and the ALJ consolidated the two claims.

On June 5, 1998, attorney David Colapinto, who had represented Gaballa in the ERA matter since April 1996, asked the ALJ to allow him to withdraw as counsel. Over Gaballa's objection, the ALJ approved the withdrawal by order dated July 7, 1998. On August 3, 1998, Colapinto filed with the ALJ a Notice of Lien for $65,000, Colapinto's estimate of his fees and costs for representing Gaballa before the withdrawal. In October 1998, Gaballa hired a new attorney and began preparation for the hearing on his ERA claims.

On March 18, 1999, the parties submitted a signed settlement agreement to the ALJ for approval. The terms of the agreement primarily pertain to a workers' compensation action brought by Gaballa against CP&L pursuant to the North Carolina Workers' Compensation Act, but the agreement also includes Gaballa's waiver of all his ERA whistleblower claims against CP&L. Finding that the agreement constituted a fair, adequate and reasonable settlement, the ALJ, by order of March 23, 1999, recommended approval of the agreement and dismissal of the case.

After receiving notice that the agreement had been approved, CP&L reminded the ALJ that the agreement had failed to address Colapinto's Notice of Lien. In response, the ALJ vacated his March 23 order and requested that the parties inform him of the amount to be paid to Colapinto from the proceeds of the agreement. CP&L and Gaballa responded that Colapinto has no legal basis to assert a lien against the settlement, and that he should be paid nothing under the agreement because Gaballa had waived his ERA claims, and the monies to be paid under the agreement were for the workers' compensation claim on which Colapinto did no work.

Thereafter, the ALJ ordered Colapinto to show cause why approval of the agreement should not be reinstated with a finding that the asserted lien for attorney's fees is not actionable in the administrative forum. Colapinto responded to the show cause order and also moved to intervene in the case. After a flurry of letters, motions, responses and replies from Colapinto, Gaballa and CP&L, on May 27, 1999, the ALJ denied Colapinto's

motion to intervene and reinstated the March 23, 1999 order recommending approval of the settlement agreement.

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Colapinto timely petitioned this Board for review of the March 23 and May 27, 1999 recommended decisions. Gaballa moved to strike the petition for review. Pursuant to our order, Colapinto, Gaballa and CP&L filed briefs.

DISCUSSION

An ALJ's recommended decision under the Federal environmental whistleblower statutes becomes the agency's final decision unless a petition for review is timely filed with the Adminis-trative Review Board. 29 C.F.R. §24.7(d). As neither Complainant nor Respondent requested review, this case is before us based solely on Colapinto's petition. Thus, the question before us is whether Colapinto is eligible to petition for review.

Causes of action under the ERA's employee protection provisions are controlled by the implementing regulations found at 29 C.F.R. Part 24 and the procedural regulations of the Office of Administrative Law Judges at 29 C.F.R. Part 18.[1]

Under the Part 24 regulations, only a *party* may seek review of a recommended decision.[2] 29 C.F.R. §24.8(a). The term *party* is not defined in the Part 24 regulations. However, the term as used in Part 24 plainly encompasses complainants and respondents ("A copy of the request for a hearing shall be sent by the *party* requesting a hearing to the *complainant* or the *respondent* (employer), as appropriate . . . .")(emphasis added). *Id.* at §24.4(d)(3). The Part 24 regulations also expressly permit the Assistant Secretary for Occupational Safety and Health to attain party status in an ERA proceeding.[3] *Id.* at §24.6(f)(1). Although the Part 24 regulations contain no explicit mechanism for awarding party status to anyone other than a complainant, a respondent, or the Assistant Secretary, Part 24 must be construed *in pari materia* with the Part 18 regulations governing proceedings before administrative law judges.

Part 18 provides that persons and entities other than a complainant and a respondent may be allowed to participate as parties in certain limited circumstances.[4] *Id.* at §18.10(b)-(d). A person wishing to participate as a party to a proceeding must timely file a petition containing specific information with the administrative law judge.[5] *Id*. at §18.10(c). If any party objects to the participation request, the ALJ shall grant or deny party status based on his determination as to whether the petitioner has the requisite interest to be a party in the proceedings. *Id.* at §18.10(d). Specifically, the ALJ must assess whether: (1) the final decision could directly and adversely affect the organization or the class the petitioner represents; (2) the petitioner could contribute materially to the disposition of the proceedings; and (3) the petitioner's interest is adequately represented by existing parties. *Id*. at §18.10(b). Colapinto did not petition the ALJ for party status, and therefore the ALJ did not make the determination necessary to grant him that status.

Even if we were to treat Colapinto's motion to intervene as a Section 18.10(c) petition for party status, we would conclude that it was deficient because Colapinto failed to address the issue of "how his participation as a party would contribute materially to the disposition of the proceedings." *Id*. Furthermore, for Colapinto the 15-day time limitation applicable to a petition for party status began to run in July 1998, when he withdrew as counsel. *Id*. at §18(c). There-fore, Colapinto's motion to intervene, submitted in April 1999, some nine months after his with-drawal, was untimely filed.

Based upon our reading of the Part 24 and the Part 18 regulations, we conclude that Colapinto is not a party to these proceedings. Accordingly, pursuant to 29 C.F.R. §24.8(a), he is not eligible to petition this Board for review of the ALJ's recommended decision. Gaballa's motion to strike is granted, and the case is dismissed.[6]

CONCLUSION

For the foregoing reasons, the motion to strike the petition for review is granted and the complaint is dismissed.[7]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[ENDNOTES]

[1] Part 18 of Title 29 of the Code of Federal Regulations is titled Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. Section 18.1(a) provides in relevant part:

> These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges, United States Department of Labor . . . . To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling.

[2] "Any *party* desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board . . . ." 29 C.F.R. §24.8(a)(emphasis added).

[3] The decision to participate as a party is left to the Assistant Secretary's discretion, can occur at any time in the proceedings, and includes the right to petition for review of an ALJ's recommended decision. 29 C.F.R. §24.6(f)(1).

[4] The Part 18 regulations define *party* -- with some circularity -- as "a person or agency named or admitted as a *party"* to the proceeding. 29 C.F.R. §18.2(g) (emphasis added).

[5] Such a person must submit a petition to the administrative law judge 15 days after the person has knowledge of or should have known about the proceeding. *Id*. at §18.10(c). The petition must concisely state: (1) the petitioner's interest in the proceeding; (2) how his participation as a party will contribute materially to the disposition of the proceeding; (3) who will appear for the petitioner; (4) the issues on which the petitioner wishes to participate; and (5) whether the petitioner intends to present witnesses. *Id.*

[6] There is an additional reason to dismiss Colapinto's petition for review. The ERA's attorneys' fees provision -- which accords prevailing complainants attorneys' fees as part of costs and expenses -- promotes a laudable statutory goal: complainants will be able to afford adequate representation by counsel when they successfully bring ERA employee protection complaints. However, the dispute between Colapinto and Gaballa regarding Colapinto's fees is essentially contractual in nature, and is beyond our adjudicatory authority under the ERA.

[7] Board Member E. Cooper Brown did not participate in the consideration of this case.